INSPECTION AND GRADING

DEPARTMENTAL DECISION

In re: AMERICAN RAISIN PACKERS, INC., A CALIFORNIA CORPORATION.
I & G Docket No. 99-0001.
Decision and Order filed May 1, 2001.

Raisin inspection – Withdrawal of inspection services – Willful – Warning letter – Eighth Amendment – Excessive fines clause – Sanction policy – Sanction testimony.

The Judicial Officer affirmed the Initial Decision and Order of Chief Administrative Law Judge James W. Hunt (Chief ALJ) ordering Respondent debarred for 1 year from receiving inspection services under the Agricultural Marketing Act of 1946 (Act) and the Regulations issued pursuant to the Act (7 C.F.R. pt. 52). The Judicial Officer rejected Respondent's arguments (1) that debarment was erroneously ordered because the required willfulness was not shown under the controlling Regulation (7 C.F.R. § 52.54); (2) that a warning letter was erroneously admitted and considered by the Chief ALJ; and (3) that debarment would end Respondent's business, which is an excessive penalty, in violation of the Eighth Amendment to the Constitution of the United States. The Judicial Officer held that willfulness is not required under 7 C.F.R. § 52.54(a)(1)(ii); that warning letters are routinely admitted into evidence and considered in fashioning sanctions; and that a 1-year debarment is not an excessive fine under the Eight Amendment to the Constitution of the United States. Complainant raised three arguments on appeal: (1) that Respondent should not be allowed to consider a debarment from government contracting to be part of the sanction in the proceeding; (2) that the Chief ALJ erroneously did not find willfulness; and (3) that the evidence should result in a 4-year debarment. The Judicial Officer rejected these arguments because the Chief ALJ did not confuse government contracting debarment with the sanction in the proceeding, willfulness was correctly not found, and the Chief ALJ's 1-year debarment sanction is appropriate.

Sharlene Deskins, for Complainant.
Brian C. Leighton, Clovis, California, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this debarment proceeding by filing a Complaint on December 3, 1998. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards issued under the Agricultural Marketing Act (7 C.F.R.
pt. 52) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under

Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

Complainant alleges: (1) between approximately August 5, 1998, and August 11, 1998, American Raisin Packers, Inc. [hereinafter Respondent], caused the issuance of false inspection certificates with respect to raisins purchased by the United States Department of Agriculture from Respondent by misrepresenting Golden seedless raisins as natural Thompson seedless raisins and shipping the Golden seedless raisins as U.S. Grade B natural Thompson seedless raisins, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h) (1994)) and section 52.54(a)(2) of the Regulations and Standards (7 C.F.R. § 52.54(a)(2)); (2) between approximately August 5, 1998, and August 11, 1998, Respondent packed and shipped Golden seedless raisins and represented that the Golden seedless raisins had been inspected and graded as U.S. Grade B natural Thompson seedless raisins, when in fact the Golden seedless raisins had not been so graded and inspected, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h) (1994)) and section 52.54(a)(2) of the Regulations and Standards (7 C.F.R. § 52.54(a)(2)); (3) between approximately August 5, 1998, and August 11, 1998, Respondent engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the application or filing for an application for inspection and grading services and the submission of samples for inspection and grading, in violation of section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54); and (4) Respondent's acts and practices, as alleged in paragraphs 5, 6, and 7 of the Complaint, constitute sufficient cause for debarment of Respondent from the benefits of the Agricultural Marketing Act, including inspection and grading services, in accordance with section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54) (Compl. ¶¶ 5-8).

On December 23, 1998, Respondent filed an Answer to Complaint, in which Respondent denies the material allegations of the Complaint and proffers six affirmative defenses.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] presided over a hearing in Fresno, California, on May 24, 2000. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brian C. Leighton, Brian C. Leighton Law Offices, Clovis, California, represented Respondent. On September 8, 2000, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof [hereinafter Complainant's Brief]. On October 12, 2000, Respondent filed Respondent's Findings of Fact, Conclusions of Law and Brief in Support Thereof [hereinafter Respondent's Brief]. On October 25, 2000, Complainant filed Complainant's Reply to the Respondent's Brief [hereinafter Complainant's Reply Brief].

On November 21, 2000,[1] the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondent's failure to provide 100 percent Thompson seedless raisins[2] to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54; and (2) ordering Respondent debarred for 1 year from receiving agricultural marketing inspection services (Initial Decision and Order at 12).

On January 5, 2001, Respondent filed Respondent's Appeal Petition from the Decision and Order of the Administrative Law Judge [hereinafter Respondent's Appeal Petition]. On February 2, 2001, Complainant filed: Complainant's Opposition to the Respondent's Appeal Petition and Request of Extension of Time to File a Brief in Opposition; Complainant's Appeal Petition; and Complainant's Brief in Support of Its Appeal Petition [hereinafter Complainant's Appeal Brief]. On February 5, 2001, Complainant filed Notice of Filing of Attachment. On February 12, 2001, Complainant filed Complainant's Brief in Support of Its Opposition to the Respondent's Appeal Petition [hereinafter Complainant's Reply to Respondent's Appeal Petition]. On March 5, 2001, Respondent filed Respondent's Response to Complainant's Appeal Petition and Reply to Complainant's Opposition to the Respondent's Appeal Petition [hereinafter Respondent's Reply to Complainant's Appeal Brief]. On March 6, 2001, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order with minor modifications. Additional conclusions by the Judicial Officer follow the Chief ALJ's Initial Decision and Order, as restated.

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[1] The Hearing Clerk's time and date stamp indicates that the Chief ALJ filed the Initial Decision and Order on November 21, 2001. Based on the record, I infer the Hearing Clerk erroneously indicated the Chief ALJ filed the Initial Decision and Order on November 21, 2001, and the correct date on which the Chief ALJ filed the Initial Decision and Order is November 21, 2000.

[2] The Chief ALJ stated in the Initial Decision and Order that "Respondent's failure to provide one percent Thompson seedless raisins to USDA for sampling as required by Invitation No. 21 constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54" (Initial Decision and Order at 12). Based on my review of the entire Initial Decision and Order, I infer the Chief ALJ's conclusion that Respondent failed to provide "one percent" Thompson seedless raisins to the United States Department of Agriculture is a typographical error and the Chief ALJ concluded that Respondent's failure to provide 100 percent Thompson seedless raisins to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54).

Complainant's exhibits are designated by "CX"; Respondent's exhibits are designated by "RX"; and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7–AGRICULTURE

. . . .

CHAPTER 38–DISTRIBUTION AND MARKETING OF AGRICULTURAL PRODUCTS

. . . .

§ 1622. Duties of Secretary relating to agricultural products

The Secretary of Agriculture is directed and authorized:

. . . .

(h) Inspection and certification of products in interstate commerce; credit and future availability of funds; investment; certificates as evidence; penalties

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe[.]

7 U.S.C. § 1622(h) (1994).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B–REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I–AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES),

DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER C–REGULATIONS AND STANDARDS UNDER THE AGRICULTURAL MARKETING ACT OF 1946

. . . .

PART 52–PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

Subpart–Regulations Governing Inspection and Certification

. . . .

Miscellaneous

. . . .

§ 52.54 Debarment of service.

(a) The following acts or practices, or the causing thereof, may be deemed sufficient cause for the debarment, by the Administrator, of any person, including any agents, officers, subsidiaries, or affiliates of such person, from any or all benefits of the Act for a specified period. The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall be applicable to such debarment action.

(1) *Fraud or misrepresentation*. Any misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with:

(i) The making or filing of an application for any inspection service;

(ii) The submission of samples for inspection;

(iii) The use of any inspection report or any inspection certificate, or appeal inspection certificate issued under the regulations in this part;

(iv) The use of the words "Packed under continuous inspection of the U.S. Department of Agriculture," any legend signifying that the product has been officially inspected, any statement of grade or words of similar import in the labeling or advertising of any processed product;

(v) The use of a facsimile form which simulates in whole or in part any official U.S. certificate for the purpose of purporting to evidence the

U.S. grade of any processed product.

(2) *Wilful violation of the regulations in this subpart.* Wilful violation of the provisions of this part of the Act.

(3) *Interfering with an inspector, inspector's aid, or licensed sampler.* Any interference with, obstruction of, or attempted interference with, or attempted obstruction of any inspector, inspector's aide, or licensed sampler in the performance of his duties by intimidation, threat, assault, bribery, or any other means–real or imagined.

. . . .

Subpart–United States Standards for Grades of Processed Raisins

. . . .

§ 52.1843 Summary of types (varieties) of processed raisins.

(a) Type I–Seedless Raisins.
(1) Natural.
(2) Dipped, Vine-dried, or similarly processed raisins.
(b) Type II–Golden Seedless Raisins.
(c) Type III–Raisins with Seeds.
(1) Natural.
(i) Seeded (seeds removed).
(ii) Unseeded-capstemmed (loose).
(iii) Unseeded-uncapstemmed (loose).
(iv) Layer (or Cluster).
(2) Dipped, Vine-dried, or other similarly processed raisins.
(i) Seeded (seeds removed).
(ii) Unseeded-capstemmed (loose).
(iii) Unseeded-uncapstemmed (loose).
(d) Type IV–Sultana Raisins.
(e) Type V–Zante Currant Raisins.
(i) Unseeded.
(ii) Seeded.

(f) Type VI–Mixed Types or Varieties of Raisins. A mixture of two or more different types (varieties) of raisins including sub-types outlined in this section but other than: (1) Mixtures containing Layer or Cluster Raisins with seeds; (2) Mixtures containing Unseeded-capstemmed and Unseeded-uncapstemmed Raisins with Seeds; and (3) mixture of Seeded and Unseeded Raisins with Seeds.

. . . .

Type I–Seedless Raisins

. . . .

§ 52.1846 Grades of seedless raisins.

. . . .

(b) "U.S. Grade B" is the quality of seedless raisins that have similar varietal characteristics; that have a reasonably good typical color; that have a good characteristic flavor; that show development characteristics of raisins prepared from reasonably well-matured grapes with not less than 70 percent, by weight, of raisins that are well-matured or reasonably well-matured; that contain not more than 18 percent, by weight, of moisture for all varieties of seedless raisins except the Monukka variety, which may contain not more than 19 percent, by weight, of moisture; and that meet the additional requirements outlined in Table I of this subpart.

. . . .

Type II–Golden Seedless Raisins

. . . .

§ 52.1849 Grades of golden seedless raisins.

Except for color, the grades of Golden Seedless Raisins are the same as for Seedless Raisins (See § 52.1846 and Table I).

INITIAL DECISION AND ORDER (AS RESTATED)

Issue

Complainant alleges the following in Complainant's Reply Brief as the issue to be decided:

The complaint charges the Respondent with violating Section 52.54 (7 C.F.R. § 52.54) of the regulations by engaging in misrepresentation, deception or fraudulent practices in connection with application for

> inspection services. Specifically, the Respondent added golden raisins that had been darkened to Natural Thompson Seedless (NTS) raisins that was [sic] pack [sic] for the school lunch program. The darkened golden raisins contained sulphur. The inspection standards for NTS do not provide for any sulphur to be included with NTS raisins. Thus, the Respondent by including darkened Golden raisins with NTS raisins violated Section 52.54.

Complainant's Reply Brief at 1.

Statement of the Case

Respondent, a California corporation, doing business as a producer, packer, and seller of processed raisins, is located at 2335 Chandler, Selma, California 93662 (Compl. ¶ 1; Answer to Compl. ¶ 1). Respondent sold raisins to the United States Department of Agriculture pursuant to USDA Invitation No. 21, issued on June 3, 1998, soliciting bids for "Processed Raisins U.S. Grade B (Thompson Seedless)" for domestic feeding programs (CX 2 at 1).

USDA Invitation No. 21 contained no specifications for Thompson seedless raisins except to state that they had to have been grown, packed, and processed in the United States pursuant to Announcement FV-107 (CX 2 at 1). Announcement FV-107 stated the raisins had to be inspected by United States Department of Agriculture representatives (Announcement FV-107 XI.A.; CX 1 at 7), the raisins had to meet the Good Manufacturing Practice Regulations in 21 C.F.R. pt. 110 (Announcement FV-107 XI.C.; CX 1 at 7), and the raisins had to be U.S. Grade B as defined in the United States Standards for Grades of Processed Raisins (Announcement FV-107 XII.A.1.; CX 1 at 8, CX 2 at 1). Susan Proden, Chief of the Commodity Procurement Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that the United States Department of Agriculture was contracting for 100 percent Thompson seedless raisins (Tr. 30).

The parties did not cite the specific sections of the Good Manufacturing Practice Regulations referred to in Announcement FV-107. As for the types of processed raisins, section 52.1843 of the Regulations and Standards (7 C.F.R. § 52.1843) identifies types of processed seedless raisins including: (1) Type I–natural and dipped, vine-dried, or similarly processed and (2) Type II–Golden seedless raisins.

Section 52.1846 of the Regulations and Standards (7 C.F.R. § 52.1846) provides for four grades of seedless raisins: "U.S. Grade A," "U.S. Grade B," "U.S. Grade C," and "Substandard." U.S. Grade A seedless raisins must contain not less than 80 percent well-matured or reasonably well-matured raisins, whereas U.S. Grade B seedless raisins must contain not less than 70 percent well-matured or reasonably well-matured raisins. U.S. Grade B seedless raisins-

-both Type I seedless raisins and Type II Golden seedless raisins--are allowed to contain more defects than U.S. Grade A seedless raisins, such as capstems, pieces of stem, damage, discoloration, and mold. (7 C.F.R. §§ 52.1846, .1849.) Neither the Regulations and Standards nor Announcement FV-107 refer to sulfur additives to raisins.

Respondent's bid to the United States Department of Agriculture to supply Thompson seedless raisins was accepted (CX 3, CX 4). Respondent packed the raisins in 1-pound cartons, as required by the contract, over a 3-day period beginning on August 5, 1998 (CX 19, CX 20; Tr. 35-36). United States Department of Agriculture inspector Oscar Garcia randomly selected, throughout the processing, cartons of raisins from the conveyor belt after the cartons had been sealed. He opened the cartons to conduct a visual inspection of the raisins for compliance with the Regulations and Standards. (Tr. 36-37). Mr. Garcia testified that the month before he had seen darkened Golden seedless raisins on Respondent's premises (Tr. 38-39). He said he could tell the difference between a Thompson seedless raisin and a darkened Golden seedless raisin and that he did not see any Golden seedless raisins in the cartons he inspected (Tr. 44). Mr. Garcia said the raisins he inspected met the U.S. Grade B standard and he certified that he "inspected the product and that the product meets the requirements of Announcement FV-107, which is the USDA contract" (Tr. 37-38; CX 7 at 2, CX 18). Respondent shipped 2,484 cases of raisins weighing 119,232 pounds. Each case contained 48 1-pound cartons. (CX 19).

Thereafter, Complainant, responding to a report from the Raisin Administrative Committee that the Raisin Administrative Committee had been told by an unnamed "whistle blower" that the raisins shipped by Respondent contained Golden seedless raisins (CX 10; Tr. 91), conducted further inspections of the raisins (Tr. 92-93). A visual inspection by inspectors of randomly selected cartons revealed that some cartons contained from one to seven darkened Golden seedless raisins ("one or two typically" (Tr. 109)), but that a majority of the cartons that were examined did not contain Golden seedless raisins (Tr. 98-99, 108-09). Golden seedless raisins are Thompson seedless raisins that are made into Golden seedless raisins by the application of sulfur dioxide to give the Thompson seedless raisins a golden color and impart a "bite" (Tr. 88, 94). Thompson seedless raisins can also be lightened by dipping them in hot water (Tr. 88-89). Golden seedless raisins can be redarkened by exposing them to sunlight (CX 9 at 2). They also darken with age (Tr. 178).

Golden seedless raisins contain up to 3,000 parts per million of sulfur (Tr. 106-07, 178). Thompson seedless raisins also contain some sulfur which results from the residue from the sulfur that is put on grapes during the growing season to control powdery mildew (Tr. 105-07, 223-24). The sulfur on Thompson seedless raisins can range from less than one part per million up to five parts per million (Tr. 107, 224, 239).

Complainant conducted tests for sulfur on three randomly selected groups of

samples of the raisins (Tr. 81-86). The first group revealed that 20 sample units had no sulfur and that 30 sample units had from 10 to 100 parts per million of sulfur dioxide (CX 15a). The second group revealed that 34 sample units had no sulfur and that two sample units had from 30 to 40 parts per million of sulfur dioxide (CX 15b). The third group revealed that 34 sample units had no sulfur and that two sample units had from 40 to 90 parts per million of sulfur dioxide (CX 15c). Complainant conducted additional tests in September 1998 and January 1999 to ensure that the amounts of sulfur dioxide in the raisins were accurately measured (Tr. 124; CX 31 at 1-7).

Respondent also had tests conducted on three groups of the raisins. One group of raisins revealed eight parts per million of sulfur dioxide. The second group of raisins revealed no sulfur dioxide. The third group of raisins revealed 15 parts per million of sulfur dioxide. (RX 5)

Susan Proden, Chief of the Commodity Procurement Branch, testified that, according to her understanding of the Regulations and Standards, Thompson seedless raisins are not to have any additives, such as sulfur, because some people are allergic to sulfur and that she believed that the tolerance level for sulfur in raisins is under 10 percent (Tr. 11, 24). Erik Palko, an agricultural commodity grader and inspector, stated that Thompson seedless raisins were allowed up to 10 parts per million of sulfur, which he said he believed was a Food and Drug Administration requirement, but added that under the terms of Announcement FV-107 there was to be no sulfur in the raisins (Tr. 126-27).

James Hurley, a chemist with the Dried Food Association, testified that he believed the Food and Drug Administration required labeling for products containing more than 10 parts per million of sulfur (Tr. 177).

Mickey Martinez, Assistant Officer in Charge for the United States Department of Agriculture's Fresno office and a former raisin inspector, testified that there is a "zero" tolerance for sulfur in Thompson seedless raisins and that he had never heard of a 10-parts-per-million tolerance (Tr. 100). However, United States Department of Agriculture Laboratory Sample Submittal Sheets containing the results of tests for sulfur conducted in January 1999 contain the notation "pass" for those samples containing less than 10 parts per million of sulfur and the notation "fail" for those samples exceeding 10 parts per million of sulfur (CX 31 at 3, 6, 7).

Eric M. Forman, Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, testified that the sulfur in the raisins posed a risk to human health (Tr. 191). He did not refer to any authoritative source to substantiate this assertion. James Hurley, the chemist for the Dried Food Association, said that some people are allergic to sulfur and that is why the Food and Drug Administration requires that products that contain in excess of 10 parts per million of sulfur be labeled (Tr. 186).

Hubert Riedele, former vice president and general manager of the Dried Fruit Association, testified that he has had experience with inspection programs

and sulfur testing in raisins (Tr. 214-15). He said that while some persons are allergic to sulfur and the Food and Drug Administration requires that products that contain over 10 parts per million of sulfur be labeled, the Food and Drug Administration does not have a maximum limit for sulfur dioxide in a product because it considers sulfur dioxide to be safe (Tr. 221, 227).

[BY MS. DESKINS:]

Q. Okay. Let's get back to my question, sir. If I have an allergy to sulfur and I open up one of those boxes and I eat a couple of those darkened golden raisins, what affect [sic] would that have on me?

[BY MR. RIEDELE:]

A. Probably very little.

Q. Even if I have an allergy to it?

A. You can eat the whole box and you wouldn't have that much.

Q. Okay. And you have knowledge, you're familiar with the reactions that people with allergies to sulfur have?

A. I have a lot of experience with sulfur dioxide with air pollution people, people that have been exposed to sulfur dioxide working in plants and everything else, and I frankly don't see how anybody could eat a product with one or two parts per million of sulphur dioxide and have a reaction, unless you're extremely allergic to it.

Q. Okay. So, the FDA labeling requirements are nonsense in your opinion?

A. No, it doesn't mean nonsense.

Q. You just--

A. They set the ten parts per million because that was generally safe for people with asthmatic conditions.

Q. Okay. But you just said that, you know, you've never seen any problems with that, even with people that have sulfur allergies?

A. Well, I've never seen any problem with you or anybody else that

had problems.

Q. Okay. So, you really can't say what affect [sic] it would have on someone that has a sulfur allergy?

A. No, I don't think anybody else could because there hasn't been any scientific data and testing done on that, except the FDA does say that anything under ten parts per million is not going to be -- doesn't have to be labeled for asthmatic people, or people that are allergic to SO2. Now, that's the law.

Tr. 227-28.

The Food and Drug Administration's regulations at 21 C.F.R. § 182.3862 provide that sulfur dioxide is generally recognized as safe.[3] Despite the testimony of Eric Forman that sulfur is a risk to human health (Tr. 191), another United States Department of Agriculture official reported that he was aware that the Food and Drug Administration considered sulfur dioxide to be generally recognized as safe (CX 14).

Terry W. Kaiser, a compliance officer employed by the Agricultural Marketing Service, United States Department of Agriculture, testified that in September 1998, Respondent's reports to the Raisin Administrative Committee indicated that Respondent had approximately 30,000 pounds of Golden seedless raisins in reserve for which Respondent could not accurately account (Tr. 162-63).

Greg Paboojian, Respondent's general manager, offered several reasons to account for these raisins: the reports sent to the Raisin Administrative Committee were based only on an average of the estimated amount of raisins in bins (Tr. 257-58), raisins are lost due to shrinkage (Tr. 255), and the reports did not take into account the darkened raisins that Respondent sold for bird food

[3] **§ 182.3862 Sulfur dioxide.**

(a) *Product*. Sulfur dioxide.

(b) [Reserved]

(c) *Limitations, restrictions, or explanation*. This substance is generally recognized as safe when used in accordance with good manufacturing practice, except that it is not used in meats; in food recognized as a source of vitamin B1; on fruits or vegetables intended to be served raw to consumers or sold raw to consumers, or to be presented to consumers as fresh.

(Tr. 245). Raisins sold for non-human consumption, such as bird feed, do not have to be inspected for compliance with the Regulations and Standards (Tr. 51). Greg Paboojian said he did not know how the Golden seedless raisins got mixed with the Thompson seedless raisins, but that this might have occurred inadvertently because darkened Golden seedless raisins were stored in bins in the same room with bins of Thompson "tailings." (Tr. 249-50). He said that during the processing, when raisins are vacuumed and screened, some good raisins accumulate with stems and bad raisins (Tr. 268). These "tailings" are then rerun through the process to salvage the good raisins which are then blended with the raisins being packed (Tr. 269). Greg Paboojian said that because the tailings were in the same room with Golden seedless raisins a forklift operator moving the bins may not have known the difference between Thompson seedless raisins and darkened Golden seedless raisins (Tr. 249-50, 268-70).

Another reason offered for the Golden seedless raisins being mixed with the Thompson seedless raisins was presented by Hubert Riedele, who testified that he had had experience in the past where Golden seedless raisins were mixed with other raisins because machinery was not properly cleaned after Golden seedless raisins were processed (Tr. 235-36).

Eric Forman, however, stated that the mixing of Golden seedless raisins with Thompson seedless raisins was willful and fraudulent because Respondent had an economic motive to mix the raisins and that Respondent caused the United States Department of Agriculture inspector to issue a false inspection certificate by misleading the inspector with the type of raisins presented for inspection (Tr. 190-92, 200). However, a United States Department of Agriculture report in September 1998 stated "there would normally be no reason for raisin handlers to commingle Golden raisins with Natural Thompson Seedless raisins, as Golden raisins of good quality are worth much more than Natural Thompson Seedless." (CX 8).

Discussion

Complainant contends that because USDA Invitation No. 21 called only for Thompson seedless raisins, Respondent engaged in fraud, misrepresentation, and deceptive practices by including sulfur and Golden seedless raisins with the Thompson seedless raisins it provided to the United States Department of Agriculture for inspection. Complainant contends that this fraudulent practice is shown by Respondent's actions in darkening the Golden seedless raisins, placing the Golden seedless raisins where they could be blended with the Thompson seedless raisins for the purpose of making it difficult for Respondent's employees to distinguish Golden seedless raisins from Thompson seedless raisins, failing to fully account for the disposition of 30,000 pounds of Golden seedless raisins, engaging in the practice of mixing poor quality raisins

with better quality raisins, deceiving purchasers of raisins for bird feed by darkening Golden seedless raisins to have them resemble Thompson seedless raisins, and failing to provide measures to prevent Golden seedless raisins from being mixed with Thompson seedless raisins. (Complainant's Brief at 5-9.) Complainant also contends Respondent could have blended Golden seedless raisins with Thompson seedless raisins when the United States Department of Agriculture inspector was not taking samples (Complainant's Brief at 9).

Complainant's arguments are speculative. There is a lack of substantial evidence showing that Respondent engaged in a deceptive or fraudulent practice or act. Further, the evidence does not support Complainant's contentions that sulfur is a risk to human health and that the Regulations and Standards and Announcement FV-107 do not allow any sulfur in raisins. Rather, the record shows that sulfur is generally recognized as safe and Thompson seedless raisins may have up to five parts per million of sulfur.

Nevertheless, the amount of sulfur present in the raisins is relevant. The record shows that Thompson seedless raisins could account for up to five parts per million of sulfur. The record also shows, at least in this case, that only Golden seedless raisins could account for the raisins having more than five parts per million of sulfur. Thus, it can be assumed that the test samples showing more than five parts per million of sulfur was due to the presence of Golden seedless raisins.

USDA Invitation No. 21 called only for Thompson seedless raisins. However, Golden seedless raisins, a different variety according to the Regulations and Standards, were present with the Thompson seedless raisins. Respondent's failure to provide 100 percent Thompson seedless raisins is a failure to comply with USDA Invitation No. 21 and Announcement FV-107. Respondent's inclusion of any amount of Golden seedless raisins with the Thompson seedless raisins, for whatever reason, is a misrepresentation of the variety of raisins Respondent had agreed to supply. Accordingly, regardless of the relatively small number of Golden seedless raisins, Respondent violated section 52.54(a)(1)(ii) of the Regulations and Standards (7 C.F.R. § 52.54(a)(1)(ii)).

While Respondent's violation was not of the gravity that Complainant alleges, Complainant also cited a prior instance where Respondent was warned about an alleged failure to comply with the Regulations and Standards (CX 5). Considering all the circumstances, I find a 1-year debarment of Respondent from inspection services is appropriate.

Findings of Fact

1. Respondent is a California corporation, doing business as a producer, packer, and seller of processed raisins. It is located at 2335 Chandler, Selma, California 93662.

2. On June 3, 1998, the United States Department of Agriculture issued USDA Invitation No. 21, soliciting bids for "Processed Raisins U.S. Grade B (Thompson Seedless)" for domestic feeding programs. USDA Invitation No. 21 incorporated by reference Announcement FV-107. Announcement FV-107 provided that sellers of raisins to the United States Department of Agriculture had to comply with the United States Standards for Grades of Processed Raisins (7 C.F.R. §§ 1841-1858).

3. The Regulations and Standards provide that Thompson seedless raisins are a different type or variety than Golden seedless raisins.

4. USDA Invitation No. 21 required that sellers provide 100 percent Thompson seedless raisins to the United States Department of Agriculture.

5. Respondent made a bid to sell Thompson seedless raisins to the United States Department of Agriculture pursuant to USDA Invitation No. 21 and Announcement FV-107. The United States Department of Agriculture accepted the bid. Respondent provided 2,484 cases of raisins weighing 119,232 pounds to the United States Department of Agriculture pursuant to USDA Invitation No. 21.

6. The raisins provided by Respondent for sampling contained Golden seedless raisins.

7. Respondent did not provide 100 percent Thompson seedless raisins to the United States Department of Agriculture as required by USDA Invitation No. 21.

Conclusion of Law

Respondent's failure to provide 100 percent Thompson seedless raisins to the United States Department of Agriculture for sampling, as required by USDA Invitation No. 21, constitutes a misrepresentation and a violation of 7 C.F.R. § 52.54(a)(1)(ii).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Both Respondent and Complainant appeal the Chief ALJ's Initial Decision and Order, but their appeal petitions contain no real disagreement with the Chief ALJ's explication of the facts. Rather, the parties characterize, explain, and argue the facts to support their respective views of how the Chief ALJ's Initial Decision and Order should be changed to suit their respective viewpoints, and what the sanction should be.

Respondent's Appeal

Respondent makes three major arguments on appeal. First, Respondent argues the Chief ALJ committed error by ordering debarment, because the Chief

ALJ did not find willfulness, and section 52.54 of the Regulations and Standards (7 C.F.R. § 52.54) allows debarment only for intentional acts of fraud, misrepresentation, or deceptive practices (Respondent's Appeal Pet. at 2). Respondent is incorrect that the Regulations and Standards require willfulness as a basis before there can be a debarment.

An examination of 7 C.F.R. § 52.54 reveals three bases for debarment: (1) fraud or misrepresentation (7 C.F.R. § 52.54(a)(1)); (2) willful violation of 7 C.F.R. pt. 52 or the Agricultural Marketing Act (7 C.F.R. § 52.54(a)(2)); and (3) interfering with an inspector, inspector's aid, or licensed sampler (7 C.F.R. § 52.54(a)(3)). Although Respondent argues that "willful" applies in all three categories, the plain language displays "willful"only in 7 C.F.R. § 52.54(a)(2), which is quite clear that a *willful* violation of the Regulations and Standards or the Agricultural Marketing Act is cause for debarment. Neither the word "willful," nor any synonym of "willful,"is displayed in 7 C.F.R. § 52.54(a)(1) or in 7 C.F.R. § 52.54(a)(3).

These distinctions are important because the Complaint has two allegations based upon willfulness (Compl. ¶¶ 5, 6) and two allegations based not upon willfulness, to wit, a violation of 7 C.F.R. § 52.54(a)(1)(i) and a violation of 7 C.F.R. § 52.54(a)(1)(ii) (Compl. ¶ 7). Moreover, the Chief ALJ found that the record supported only part of paragraph 7 of the Complaint, implicating only one part of one paragraph of 7 C.F.R. § 52.54, to wit, "misrepresentation" in 7 C.F.R. § 52.54(a)(1)(ii). That the Chief ALJ's analysis is correct is best shown by looking at 7 C.F.R. § 52.54 in reverse order from paragraph (a)(3), as follows.

Paragraph (a)(3) has no application in this proceeding because paragraph (a)(3) proscribes interference with a United States Department of Agriculture inspector, which offense neither has been alleged in the Complaint nor has been raised anywhere in the record.

Paragraph (a)(2), covering "willful violation," was alleged in paragraphs 5 and 6 of the Complaint, but, the Chief ALJ did not find that this record supported willfulness in any of Respondent's actions. I agree with the Chief ALJ on willfulness.

Paragraph (a)(1) has two discrete parts: "misrepresentation" and "deceptive or fraudulent practice or act." However, the Chief ALJ inadvertently inverted the wording of 7 C.F.R. § 52.54(a)(1) in a conflated sentence in the Initial Decision and Order, as follows: "There is a lack of substantial evidence showing that there was *a practice of fraudulent misrepresentation or deception.*" (Initial Decision and Order at 9 (emphasis added).) In this Decision and Order, I modify the above italicized wording to read *a deceptive or fraudulent practice or act,* which brings the Chief ALJ's Initial Decision and Order, as restated, into conformity with 7 C.F.R. § 52.54(a)(1). Also, I find the Chief ALJ's conflation insignificant, and not even approaching reversible error. Section 52.54(a)(1) of the Regulations and Standards is clearly written in the

disjunctive: "[a]ny misrepresentation **or** deceptive or fraudulent practice or act" (7 C.F.R. § 52.54(a)(1) (emphasis added)). I find that this case hinges on only the first part, "misrepresentation," and the second part, "deceptive or fraudulent practice or act," is irrelevant to my decision.

Nevertheless, Respondent points to the conflation and argues that the Chief ALJ found "a lack of substantial evidence showing intentional, willful or fraudulent behavior by the Respondent" (Respondent's Appeal Pet. at 2). Respondent's willfulness argument is correct, as far as Respondent's argument goes, but Respondent's willfulness argument misses the point. The violation for which the Chief ALJ debarred Respondent is neither dependent on willfulness nor based in a "deceptive or fraudulent practice or act." Rather, the Chief ALJ found a misrepresentation in connection with Respondent's submission of samples for inspection in violation of 7 C.F.R. § 52.54(a)(1)(ii) as alleged in one part of paragraph 7 of the Complaint. I agree with the Chief ALJ that Respondent's violation is misrepresenting samples for inspection.

Complainant correctly argues that Respondent may be debarred not only for willful violations, but also for non-willful misrepresentation under 7 C.F.R. § 52.54 (Complainant's Reply to Respondent's Appeal Pet. at 2). However, Complainant also argues in reply to Respondent's first argument on appeal that Respondent's actions were willful (Complainant's Reply to Respondent's Appeal Pet. at 2-3). The Chief ALJ looked at Complainant's case on willfulness, and adjudged it "speculative" (Initial Decision and Order at 9). I have very carefully examined the record in search of evidence of willful violations. Although Respondent's actions would raise the suspicions of any reasonable observer that Respondent's shortcomings were intentional, I still agree with the Chief ALJ on willfulness. The record evidence is not strong enough to take to a reviewing court with any degree of confidence that the court would agree that willfulness was supported by the record.

Second, Respondent argues the Chief ALJ erred by admitting and considering a warning letter (CX 5), dated September 24, 1996, from the Agricultural Marketing Service, United States Department of Agriculture, informing Respondent of two alleged violations of Raisin Marketing Order No. 989: (1) using off-grade raisins to fulfill a United States Department of Agriculture contract, and (2) misrepresenting processed raisins as natural condition raisins (Respondent's Appeal Pet. at 4). The warning letter reads as follows:

> September 24, 1996
>
> Mr. John Paboojian
> American Raisin Packers, Inc.
> 2335 Chandler Street
> P.O. Box 30

Selma, Ca 93662

Dear John:

This letter is to bring to your attention two prior incidents which were investigated concerning American Raisin Packers, Inc.'s, (American Raisin) alleged violations of the Raisin Marketing Order No. 989.

The first incident was when American Raisin received an award under contract #120212191 to pack 19,200 cases of 48/1 lb. cartons of raisins for government distribution. While American Raisin was packing raisins under this contract on April 26, 1991, six pallets of off-grade raisins were placed on hold by USDA inspectors. On May 2, 1991, USDA found that the six pallets of off-grade raisins had disappeared. The USDA inspectors were informed by American Raisin that the pallets of off-grade raisins were dumped on April 27, 1991, by your employees without notifying the USDA Inspection Service. During a subsequent destination review of product delivered by American Raisin, shipping containers of raisins from Contract #120212191 were examined and opened by USDA at USDA storage warehouses in Sioux Falls, South Dakota; Orlando, Florida; and Denver, Colorado. It was apparent that the off-grade raisins packed on April 26, 1991, which were allegedly dumped on April 27, 1991, were not dumped. One pound packages of raisins marked with codes corresponding to the off-grade raisins, which were allegedly dumped, were found at destination commingled with one pound cartons of "meeting" raisins, packed in shipping cases exhibiting code dates of the meeting raisins. The raisins in question, bearing the codes of the raisins which were allegedly dumped, were later inspected and failed to meet the U.S. Grade B. requirements.

This is not only a violation of the FV-973 Contract Specifications, but also a violation of the Raisin Marketing Order issued pursuant to the Agricultural Marketing Agreement Act of 1937. Shipping raisins which are not packed in shipping containers that represent the date packed is in violation of Section 989.159(b) of the Administrative Rules and Regulations. Also shipping raisins that did not meet the minimum grade requirements is in violation of Section 989.59 of the Raisin Order and Section 989.702 of the Administrative Rules and Regulations.

The second incident at American Raisin was "Misrepresentation of Product". American Raisin did not officially request USDA Inspection Service for delivery of reserve raisins to distilleries. An on-site inspector had to call the USDA inspection office on May 6, 1992, to ask for

assistance when he found that your firm needed this service. During the inspection at American Raisin on May 6, 1992, USDA found that the bins of raisins offered had processed raisins layered with natural condition raisins and were topped off with natural condition raisins. The pallet control cards on these bins indicated that the raisins should have been natural condition raisins.

The USDA found five loads (200 bins) in which natural condition raisins were blended with processed raisins. When the USDA inspectors found the misrepresented product, the Raisin Administrative Committee (RAC) was contacted and the blended raisins were then fully inspected rather than USDA just performing surveillance as is normally required for delivery of natural condition raisins when coming out of the reserve pool stacks. Pursuant to a memo dated January 8, 1992, the RAC finally accepted American Raisin's blended raisins for delivery to distilleries because packers could deliver graded raisins if they had full inspection.

Section 989.66(b)(1) of the Raisin Order requires handlers to store reserve tonnage raisins in natural condition without the addition of moisture and in the same condition as when acquired. Under Section 989.66(b)(4), the RAC may arrange for such delivery of reserve raisins to consist of packed raisins. It appears that American Raisin violated Section 989.66(b)(1) of the Order.

John, the Department believes that you need to be made aware of these violations, but does not plan to take legal action at this time. However, I want to stress the need for American Raisin to adhere to all USDA laws, regulations and procedures. Future incidents of this nature could jeopardize American Raisin's eligibility to participate in USDA contracts. Also legal action may be taken to enforce any violations of the Raisin Marketing Order.

Sincerely

Richard P. Van Diest
California Marketing Field Office

CX 5.

Specifically, Respondent argues the Chief ALJ violated due process by admitting and considering the warning letter (CX 5) because the letter is hearsay, lacks proper foundation and support, and has unproven underlying facts (Respondent's Appeal Pet. at 4-5). Respondent argues that since there was

no testimony offered on this letter at the hearing which substantiates any of the allegations in the warning letter, and since no legal action was ever taken on the allegations, the letter cannot be utilized as evidence to fashion a sanction (Respondent's Appeal Pet. at 4).

Complainant replies that Respondent had every opportunity at the hearing to introduce evidence concerning this warning letter and chose not to do so (Complainant's Reply to Respondent's Appeal Pet. at 4). I agree with Complainant that Respondent cannot use a lack of evidence--which Respondent could have provided, but did not provide--as a reason to exclude the warning letter.

Complainant argues that the Rules of Practice militate against approval of Respondent's argument that the warning letter is not admissible (Complainant's Reply to Respondent's Appeal Pet. at 4). Complainant points out that the Rules of Practice only provides for the exclusion of evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely (7 C.F.R. § 1.141(h)(iv)). I agree.

Complainant argues that a warning letter, which shows that Respondent had knowledge that some of its procedures and practices were considered to be a misrepresentation by the regulatory agency in charge of such behavior, is certainly probative and relevant in determining a sanction for the same behavior (Complainant's Reply to Respondent's Appeal Pet. at 4). Again, I agree.

Complainant argues, moreover, that the Judicial Officer has determined that prior warnings can be considered in determining sanctions (Complainant's Reply to Respondent's Appeal Pet. at 4). Complainant is once again correct in that warning letters may be admitted and considered to fashion a sanction.[4] Therefore, Respondent's second argument is rejected.

Third, Respondent argues that a 1-year debarment constitutes excessive punishment in violation of the Eighth Amendment to the Constitution of the United States (Respondent's Appeal Pet. at 5-6).

The Eighth Amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Excessive Fines Clause of the Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.[5] Debarment is the act of precluding

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[4] *See In re Richard Lawson*, 57 Agric. Dec. 980, 1013 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 264 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Hutto Stockyard, Inc.*, 48 Agric. Dec. 436, 488 (1989), *aff'd in part, rev'd in part, vacated in part, and remanded*, 903 F.2d 299 (4th Cir. 1990), *reprinted in* 50 Agric. Dec. 1724 (1991), *final decision on remand*, 49 Agric. Dec. 1027 (1990).

[5] *See United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998) (stating the Excessive Fines

someone from having or doing something.[6] Debarment does not extract payment in cash or in kind. Therefore, debarment is not subject to analysis as an excessive fine.[7] The 1-year debarment of Respondent from receipt of inspection services under the Agricultural Marketing Act and the Regulations and Standards, the sanction imposed in this proceeding, does not implicate the Excessive Fines Clause of the Eighth Amendment. Therefore, I reject Respondent's contention that the debarment imposed by the Chief ALJ violated the Excessive Fines Clause of the Eighth Amendment.

Complainant's Appeal

Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense; forfeitures, payments in kind, are fines if they constitute punishment for some offense); *Hudson v. United States*, 522 U.S. 93, 103 (1997) (stating the Eighth Amendment protects against excessive fines, including forfeitures); *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (stating the purpose of the Eighth Amendment, putting the Bail Clause to one side, is to limit the government's power to punish; the Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense); *Alexander v. United States*, 509 U.S. 544, 558 (1993) (stating the Excessive Fines Clause of the Eighth Amendment limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense; at the time of the ratification of the Eighth Amendment the word "fine" was understood to mean a payment to the sovereign as punishment for some offense); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-65 (1989) (stating that at the time of the ratification of the Eighth Amendment the word "fine" was understood to mean a payment to the sovereign as punishment for some offense); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 731 (C.D. Cal. 1994) (stating the purpose of the Excessive Fines Clause of the Eighth Amendment is to limit the government's power to extract payments as punishment for an offense).

6 *See Printup v. Alexander & Wright*, 69 Ga. 553, 556 (Ga. 1882) (stating "to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); *Haynesworth v. Hall Constr. Co.*, 163 S.E. 273, 277 (Ga. Ct. App. 1932) (stating "to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); Black's Law Dictionary 407 (7th ed. 1999) (defining debarment as the act of precluding someone from having or doing something; exclusion or hindrance); Webster's Collegiate Dictionary 296 (10th ed. 1997) (defining "debar" as to bar from having or doing something); 4 The Oxford English Dictionary 308 (2d ed. 1991) (defining "debar" as to exclude or shut out from a place or condition; to prevent or prohibit from entrance or from having, attaining, or doing anything).

7 *See United States v. Stoller*, 78 F.3d 710, 719 (1st Cir. 1996) (stating debarment does not come within the Excessive Fines Clause as we understand it), *cert. dismissed*, 519 U.S. 957 (1996). *Cf. Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir. 1997) (holding the permanent disqualification of a grocery store owner from participating in the food stamp program is not a cash or in kind payment directly imposed by, and payable to, the government; therefore, the disqualification is not an excessive fine prohibited by the Eighth Amendment); *In re Sharp*, 674 A.2d 899, 900 (D.C. 1996) (stating disbarment resulting from an attorney's conviction of a crime does not involve payment of cash by way of fines or taxes for the purposes of the Eighth Amendment).

Complainant raises three major arguments on appeal. First, Complainant argues that the issue is Respondent's violation of 7 C.F.R. § 52.54 and not Respondent's violation of other government regulations (Complainant's Appeal Brief at 5). Complainant is concerned that the negative consequences inuring to Respondent, for failing to fulfill contractual requirements under USDA Invitation No. 21, will bleed over into the analysis for Respondent's concomitant, simultaneous violation of 7 C.F.R. § 52.54 (Complainant's Appeal Brief at 6).

I agree with Complainant that any repercussions, based upon Respondent's failure to deliver 100 percent Thompson seedless raisins under the terms and conditions of Respondent's contract, are separate and apart from this disciplinary proceeding, which arises not out of a contract, but rather, out of a violation of 7 C.F.R. pt. 52. This difference is easily understood. Respondent was given an opportunity under the contract to cure the deficiency, but Respondent chose not to do so (Tr. 18-20). Even if Respondent had cured the defect, Respondent would still have been subject to discipline under 7 C.F.R. § 52.54. I also find that this distinction is easily understood in the Initial Decision and Order, and a reviewing court should have no difficulty discerning that this proceeding turns solely and completely on 7 C.F.R. § 52.54, and not on contract terms.

Complainant is also concerned that the Chief ALJ's discussion of the Food and Drug Administration's food labeling requirements (21 C.F.R. § 101.100) is in error, and argues that the Initial Decision and Order should be modified to make clear that the debarment is in no way based upon Food and Drug Administration sulphur labeling requirements (Complainant's Appeal Brief at 6-7). While I agree with Complainant that this proceeding should only be based upon 7 C.F.R. § 52.54, I disagree that the Chief ALJ's Initial Decision and Order should be sanitized of the analysis of sulphur added to raisins.

That Golden seedless raisins contain up to 3,000 parts per million of sulphur and sulphur in Thompson seedless raisins can range from less than one part per million up to five parts per million are important facts in this case. It is not very likely that a reviewing court will misunderstand the role that sulphur played in this proceeding. I find the Chief ALJ correctly handled the sulphur issue.

Second, Complainant argues the evidence establishes that Respondent was involved in fraudulent and/or deceptive practices that caused the Agricultural Marketing Service to issue an inaccurate certificate (Complainant's Appeal Brief at 7). Complainant once again seizes on the Chief ALJ's conflation of the wording of 7 C.F.R. § 52.54, which I have already addressed, *supra*, to argue that the Chief ALJ misunderstands the purpose of the proceeding (Complainant's Appeal Brief at 7). But, it is clear from the Initial Decision and Order that the Chief ALJ understands the purpose of the proceeding.

Complainant argues that the Initial Decision and Order should be modified

to indicate the substantial record evidence to support violations of 7 C.F.R. § 52.54, such as undisputed evidence of sulphur packed in Respondent's raisins; undisputed evidence that Respondent did not notify the Agricultural Marketing Service of the sulphur; record testimony that Golden seedless raisins were being darkened at Respondent's facility in 1998; darkening raisins to pass for Thompson seedless raisins is a deceptive practice; not listing darkened raisins on Raisin Administrative Committee inventory is a deceptive practice; storing darkened raisins with trash raisins is a deceptive practice; and not correcting conditions allowing accidental mixing of Thompson seedless raisins and darkened Golden seedless raisins is a deceptive practice (Complainant's Appeal Brief at 8-10). I find that this list of items is actually just more argument for the intentionally "fraudulent or deceptive practice or act" portion of 7 C.F.R. § 52.54(a)(1). I reject the argument to modify the Initial Decision and Order to include these items because it would add nothing to the case. The evidence is not strong enough to find that Respondent willfully violated the Agricultural Marketing Act or the Regulations and Standards.

Complainant asks that the Initial Decision and Order be modified to clarify labeling requirements for sulphur and the effect of sulfites on human health (Complainant's Appeal Brief at 14).

I reject this request to modify the Chief ALJ's Initial Decision and Order. The sulfite issues in this proceeding are not crucial to this case. The only relevance sulphur has in this proceeding is that it just happens to be a marker for a non-conforming raisin in a contract for 100 percent Thompson seedless raisins. The marker could just as easily have been seeds, color, size, or some insect. It is pure coincidence that sulphur is also a labeling item with the Food and Drug Administration.

Third, Complainant argues the evidence supports a debarment for 4 years. Complainant contends the Chief ALJ misunderstood the issue as more of a contract dispute than a grading and certification violation causing the Chief ALJ not to weigh evidence of the damage to the integrity of Agricultural Marketing Service certificates in court cases under 7 U.S.C. § 1622(h) (1994). Complainant further contends Respondent manipulated the process for its own benefit; Respondent's violations cannot be considered incidental or inadvertent; Respondent did not heed the prior warning letter; people allergic to sulfites could have been seriously harmed by Respondent's sulfite raisins; and all of the above factors show the seriousness of the violation which requires a 4-year debarment to deter others from the same behavior. (Complainant's Appeal Brief at 15-18.)

I have already determined, *supra,* that the Chief ALJ was not confused that Respondent's violation was a contract dispute. Further, the record does not support a finding that Respondent manipulated the inspection process for its own benefit. Complainant's argument that Respondent's violations cannot be considered incidental or inadvertent is a reverse way of saying that the violation

was intentional. The Chief ALJ correctly found on the record that Respondent's violation of 7 C.F.R. § 52.54(a)(1)(ii) was not willful, and I agree. Complainant is correct that Respondent did not heed the warning letter (CX 5), but the Chief ALJ admitted and considered the warning letter and factored it into the sanction. I have carefully considered all Complainant's sanction arguments, and I conclude that these arguments are not sufficient to increase the Chief ALJ's sanction of a 1-year debarment to a 4-year debarment.

Respondent replies that it was only just barely in violation; there was no damage to the regulatory program; no allergic consumers got sick; the violations were not willful; and there were no prior violations or warnings. Respondent also argues that a 4-year debarment would be a death penalty, and regardless whether the Judicial Officer finds willfulness, there should not be a debarment of even 1 year, but only a warning against future violations. (Respondent's Reply to Complainant's Appeal Brief at 17.)

Respondent admits the violation, "barely" or not, and damage to the regulatory program does not have to be shown for a sanction of debarment. Respondent here catches a break on willfulness, because, to use Respondent's term, Respondent "barely" escapes being found to have intentionally blended two varieties of raisins when Respondent was required to provide 100 percent Thompson seedless raisins.

Moreover, Respondent is not correct that there were no prior warnings since Respondent did get a warning letter covering two alleged violations. Further, the Regulations and Standards are silent on the effect of a debarment on the business of a respondent, but, in any event, this record gives me no basis to conclude that Respondent would go out of business because of a 1-year debarment.

Sanction

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In light of this sanction policy, the sanction recommendations of administrative officials charged with the responsibility for achieving the

congressional purposes of the Agricultural Marketing Act are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the fruit and vegetable industries. Eric M. Forman, Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, is an administrative official charged with the responsibility for achieving the congressional purposes of the Agricultural Marketing Act. Therefore, Mr. Forman's testimony regarding any sanction to be imposed on Respondent is highly relevant.

However, Mr. Forman's sanction recommendation is not controlling, and the Chief ALJ has the discretion to impose any sanction on Respondent warranted in law and justified in fact.[8] The reasons why I am affirming the Chief ALJ's sanction are rife throughout my additional conclusions. I find that it is appropriate that Respondent be debarred for 1 year for its violation of 7 C.F.R. § 52.54(a)(1)(ii). Had the record supported a finding of willfulness, the full 4-year debarment sought by Complainant would have been imposed.

For the foregoing reasons, the following order should be issued.

ORDER

Respondent, American Raisin Packers, Inc., its agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, are debarred for 1 year from receiving inspection services under the Agricultural Marketing Act and the Regulations and Standards.

This Order shall become effective 30 days after service of this Order on Respondent.

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[8] The recommendation of administrative officials as to the sanction to be imposed is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. *In re Fred Hodgins*, 60 Agric. Dec. ___, slip op. at 24 (Apr. 4, 2001) (Decision and Order on Remand); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *appeal docketed*, No. 00-60844 (5th Cir. Nov. 30, 2000); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *appeal docketed*, No. 00-CV-1054 (N.D.N.Y. July 5, 2000); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).